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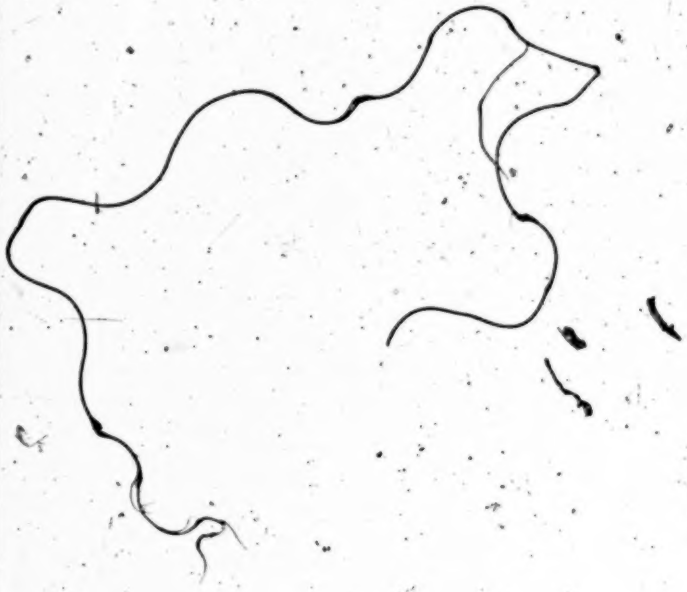

Supreme Court of the United States

October Term 1970

No. 7020

JAMES H. QUARLES, *Appellant-Petitioner*

v.

STATE OF TEXAS, ET AL, *Appellee-Respondent*

Appeal From The United States Court Of Appeals For The Fifth Circuit

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MOTION OF APPELLEES IRMA H. STEWART AND CARL TAYLOR TO DISMISS OR AFFIRM

To The Honorable Judges Of Said Court:

COME NOW Irma H. Stewart and Carl Taylor, two of the Appellees in the above cause, and pursuant to Rule 16 of the Rules of The Supreme Court of The United States, file this their motion to dismiss this appeal or to affirm the judgment of the Court of Appeals for the Fifth Circuit of The United States, dismissing the appeal in that court and in support thereof would show the Court the following:

PRELIMINARY STATEMENT

The Court of Appeals for The Fifth Circuit never ruled on the merits of this case. The only orders it ever entered were as follows: (1) Order denying Appellant Quarles to appeal to that court in *forma pauperis*, dated August 18, 1970; (2) Order dated December 1, 1970 overruling the motion of certain appellees to dismiss, but warning Appellant Quarles as follows:

> "If Appellant does not precisely comply with the spirit and letter of the Rules of Appellate Procedure in the continued prosecution of this appeal, however, the appeal will be dismissed;"

(3) Order dated December 31, 1970 dismissing the appeal; and (4) order dated March 8, 1971 denying Appellant's motion to reinstate the appeal. All of these orders relate to procedural matters only. Nevertheless, Appellant Quarles is obviously trying to appeal the case on the merits, notwithstanding the Court of Appeals never ruled on the merits. Indeed the case was never submitted, and never argued. Thus, contrary to Quarles' statement at the end of Paragraph (1) on page 2 of his Jurisdictional Statement, the Court of Appeals did not dismiss the complaint, but only the appeal because of Appellant Quarles' failure after due warning, to adhere to the Rules of Appellate Procedure.

FIRST POINT

The appeal is not within the jurisdiction of this Court because not taken in conformity to statute or to the Rules of The Supreme Court of The United States (Rule 16(a)).

(a) Appellant declares in Paragraph (ii) on page 2 of his jurisdictional statement, among other things, that "The judgements (sic) orders or decrees sought to be reviewed are The Memorandum and Order, and Final Judgement (sic) The United States District Court For The Southern District of Texas. That ruling was issued and entered on May 11, 1970. . . ."

Obviously, the attempted appeal to this court, even if otherwise possible, after almost a year after the entry of the judgment mentioned violates Rules 10 and 13 of this Court, fixing the time for the docketing of cases, and Section 2101(c), Title 28, United States Code, relating to the time for appeal and certiorari, all of which expired long before the attempted appeal to this Court.

(b) Appellant Quarles cites Section 1254 of Title 28 of The United States Code, among other authorities, as conferring jurisdiction on this Court. That statute sets out the three methods by which cases in the courts of appeal may be reviewed by this court, as follows:

> "Cases in the courts of appeal may be reviewed by the Supreme Court by the following methods:
>
> (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;
>
> (2) By appeal by a party relying on a State statute held by a court of appeals to be invalid as repugnant to the Constitution, treaties or laws of The United States, but such appeal shall preclude review by writ of certiorari at the instance of such appellant, and the review on appeal shall be restricted to the Federal questions presented;
>
> (3) By certification at any time by a court of appeals of any question of law in any civil or criminal case

as to which instructions are desired, and upon such certification the Supreme Court may give binding instructions or require the entire record to be sent up for decision of the entire matter in controversy."

Sections (1) and (3) do not apply since Quarles did not file a petition for writ of certiorari, nor did the Court of Appeals ever certify any question in this case to this Court. But Section (2) does not apply either, because this appeal does not involve "an appeal by a party relying on a State statute held by a court of appeals to be invalid as repugnant to the constitution, etc." As stated, the Court of Appeals did not make any ruling at all on the merits, and besides, even if Quarles' position on the merits could be considered (which it cannot since the Court of Appeals has not ruled on the merits), it is that he is *attacking* certain statutes anyway, not relying on them. But, as stated, the only orders which could possibly be before this Court are those relating to the dismissal of the appeal. No Federal question is involved. Thus the Court has no jurisdiction under Section 1254(2) under which he attempts to appeal, which statute is exclusive as to the method of appeal. *Public Service Commission of Indiana v. Batesville Telephone Company,* 52 S.Ct. 1, 284 U.S. 6, 578, 76 L.Ed. 135. The other code provisions are likewise not applicable. Neither are any of the cases cited by Appellant, as none of them are in point. Thus, this Court has no jurisdiction by way of appeal. The appeal should be dismissed.

SECOND POINT

Should the Court consider the appeal of Appellant Quarles as improvidently taken from the Court of Appeals, and regard the papers filed as a petition for

a writ of certiorari pursuant to Section 2103 of Title 28, United States Code, nevertheless, it is manifest that the questions on which the cause depends are so unsubstantial as not to need further argument, and the writ should be denied or in the alternative, the judgment below should be affirmed.

Even if the papers filed by Appellant Quarles should be regarded by the court as a writ of certiorari under Section 2103 of Title 28, United States Code, because of the improvident appeal by Appellant, still the questions on which the decision of the cause depends are so unsubstantial as not to need further argument and hence these Appellees, pursuant to Rule 16 of this court, file this motion to affirm the judgment of the Court of Appeals dismissing the appeal in that Court.

The only question presented at all incident to the petition (if it be so regarded) is the propriety vel non of the order of the Court of Appeals dismissing the appeal in that court dated December 31, 1970 "for Appellant's failure to comply with Rule 30 of the Federal Rules of Appellate Procedure", and the order of the same court dated March 8, 1971 denying Appellant's motion for an order reinstating the appeal. Certainly the judgment of the District Court, dismissing the complaint, dated May 11, 1970, is not involved here, although the Appellant declares he is appealing from it. He could not be, as a petition for writ of certiorari filed almost a year after the entry of the judgment, even if otherwise tenable, is untimely under Rule 10 and 13 of this Court, and under Section 2101(c), Title 28, United States Code.

The orders relating to the dismissal of the appeal are procedural in character, and do not involve the case on

the merits in any way whatsoever, inasmuch as the Court of Appeals never set the case down for hearing, no hearing was had on the merits, and no order entered on the merits. The truth is that Appellant Quarles, although both the District Court and the Court of Appeals denied his motions to appeal in forma pauperis, never filed an appeal bond, failed to serve certain opposing counsel from time to time (as he is still doing in this Court), and although warned by the Court in its order dated December 1, 1970, (at that time declining the dismissal of the appeal) to the effect that "If Appellant does not precisely comply with the spirit and letter of the Rules of Appellate procedure in the continued prosecution of this appeal, however, the appeal will be dismissed", nevertheless continued to ignore the rules, did not file the appeal bond, and failed to comply with Rule 30 of the Rules of Appellate Procedure, despite the warning. The Court of Appeals then on December 31, 1970 proceeded to dismiss the appeal. The Court could not condone further the flaunting of its rules by the Appellant. Thus, the dismissal of the appeal was a proper exercise of the discretion of the Court of Appeals in the administration of justice. But the question on which the decision of the Court in so dismissing the appeal depends is unsubstantial, and hence does not need any further argument. Certainly the order of dismissal did not involve any of the types of decisions specified in Rule 19-1(b) of this Court, calling for the consideration of the court by way of a writ of certiorari.

Appellees Irma H. Stewart and Carl Taylor, pursuant to Rule 16(c) of this court, therefore say that the petition for writ of certiorari should be denied or in the alternative the judgment of the court below dismissing the appeal should be affirmed.

THIRD POINT

Even should appeal or certiorari be allowed, Appellant is not entitled to appeal in *forma pauperis*.

Both the District Court and the Court of Appeals entered orders dated June 13, 1970 and August 18, 1970, respectively, denying Appellant to appeal in *forma pauperis* to the Court of Appeals. The District Court order recited, among other things, "For the reasons set out in *Quarles v. State of Texas,* et al, Civil Action No. 69-H-643 (S.D. Tex. May 11, 1970) an appeal would be frivolous. Accordingly, leave to appeal in *forma paperis* is denied. 28 U.S.C. § 1915(d)."

Appellant, nevertheless, has never filed an appeal bond in the Court of Appeals.

The Appellant again seeks to appeal to this Court in *forma pauperis,* his affidavit reciting "Because of my poverty I am unable to pay the costs of these proceedings or to give security therefor."

The Court's attention is invited to Appellant's complaint (styled, "Plaintiffs First Amended Petition and Application for Temporary Restraining Order") and particularly Paragraph V thereof, in which he repeatedly over several pages, refers again and again to his alleged property, both real and personal, his alleged "land", and even asks the court to grant an injunction to protect his alleged property from the alleged injustices he claims in the complaint. From the allegations in said Paragraph V of the complaint, it would appear that a substantial part of Appellant's alleged claim is concerned with the asserted grievances affecting his alleged property, both real and personal, and seeks to obtain both equiable relief and damages incident to supposed wrongs affecting such property.

Now how can Appellant be poverty-stricken and unable to pay the costs of these proceedings or to give security therefor in a proceeding Appellant claims involves property, both real and personal owned by him?

The allegations as to ownership of property in the complaint are judicial admissions made by Appellant and are binding on him. These admissions made by Appellant himself, in sworn pleadings, are contrary to Appellant's affidavit in support of his motion to appeal in *forma pauperis*. The motion is not good, and it should be denied.

WHEREFORE, PREMISES CONSIDERED, Appellees Irma H. Stewart and Carl Taylor, pray that on hearing hereof that Appellant's Motion for leave to appeal in *forma pauperis* be denied, that Appellant's appeal be dismissed, that the petition for the writ of certiorari be denied, or in the alternative, that the orders of the Court of Appeals dismissing the appeal, and refusing to reinstate the appeal, be affirmed; for costs and for such other relief to which they may be entitled at law or in equity.

BARNET B. SKELTON

1224 — 500 Jefferson Building
Tel. (713) 228-6311
Houston, Texas

Attorney for Appellees
Irma H. Stewart and Carl Taylor

CERTIFICATE

THE STATE OF TEXAS :
:
COUNTY OF HARRIS :

BEFORE ME, the undersigned authority, on this day personally appeared BARNET B. SKELTON, known to me to be a credible person, who, being first duly sworn, stated upon his oath that he is the attorney of record for the Appellees, Irma H. Stewart and Carl Taylor in the above entitled and numbered cause; that he has prepared the foregoing motion to dismiss or affirm, that he has authority to make the certificate, that he is fully acquainted with the matters set forth therein and that they are all true and correct.

BARNET B. SKELTON

SUBSCRIBED and SWORN to before me, the undersigned authority on this the _____ day of May A. D. 1971.

NOTARY PUBLIC, in and for
Harris County, Texas

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing motion of Appellees, Irma H. Stewart and Carl Taylor to dismiss or affirm in the above entitled and numbered cause was mailed by the undersigned to Hon. Crawford C. Martin, Attorney General of The State of Texas in care of Sam L. Jones, Jr., Assistant Attorney General of The State of Texas, Box "R", Capital Station, Austin, Texas 78711; Hon. James H. Quarles, P. O. Box 53242 ~~23235~~, Houston, Texas 77028, Hon. William C. Harvin, One Shell Plaza Building, Houston, Texas 77002; Hon. Ronald Palmer, One Shell Plaza Building, Houston, Texas 77002 and that forty true and correct copies of said motion were mailed to Hon. E. Robert Seaber, Clerk, United States Supreme Court, Supreme Court Building, Washington, D.C., each and all of said copies of said motion to the parties, respectively, mentioned above were served on said parties by depositing same in U. S. Mail, with First Class postage prepaid, by certified mail, return receipt requested, on this the 28 day of May A. D. 1971, and this will further certify that all parties required to be served in this cause have been served with copies of said motion.

BARNET B. SKELTON